No. 16,393

IN THE

United States Court of Appeals

For the Ninth Circuit

DAVID NAUMU,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

Upon Appeal from the Supreme Court for the Territory of Hawaii

APPELLEE'S ANSWERING BRIEF

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STATEMENT OF JURISDICTION

Appellee submits that this Court assumes jurisdiction of this matter only insofar as appellant attacks the constitutionality of the statute on the grounds that the same is vague, indefinite and uncertain whereby he has been denied due process of law.

STATEMENT OF THE CASE

Appellee does not controvert appellant's statement of the case.

ARGUMENT OF THE CASE

ISSUE INVOLVED

The only issue presented to the Court is whether or not Section 11343, *Revised Laws of Hawaii,* 1945, is so vague, indefinite and uncertain as to deny anyone charged thereunder due process of law.

A. NO MANIFEST ERROR WAS COMMITTED BY THE SUPREME COURT OF HAWAII IN RULING (1) THAT FREE GAMES WON ON A PIN BALL MACHINE CONSTITUTE "ANYTHING OF VALUE" AND (2) THAT A GAME PLAYED ON SUCH MACHINE IS WITHIN THE PURVIEW OF "ANY OTHER GAME" AS CONTEMPLATED BY SECTION 11343, REVISED LAWS OF HAWAII, 1945.

It is respectfully submitted that on matters brought before it this Court should not entertain argument nor render a decision reversing the Supreme Court of Hawaii in construing the applicability of Section 11343, *Revised Laws of Hawaii,* 1945, unless there is a showing that some substantial federal question is in issue, or where the lower court is shown to have committed patent or manifest error.

The jurisdiction of this Court is clearly set forth in *USCA,* Title 28, Section 1293, which states the following:

> "The court of appeals . . . shall have jurisdiction of appeals from all final decisions of the supreme court . . . of . . . Hawaii, respectively in all cases *involving the Constitution, laws or treaties of the United States* or any authority exercised thereunder . . ." (Emphasis added.)

From the foregoing it is submitted that the jurisdiction of the Court of Appeals is a limited one. See

also: *Alford v. Territory of Hawaii,* 205 F. 2d 616; *Fukunaga v. Territory of Hawaii,* 33 F. 2d 396; *Pae v. Stevens,* 256 F. 2d 208; *Pioneer Mill Co. v. Victoria Ward,* 158 F. 2d 122; *Waialua Agr. Co. v. Christian,* 305 U.S. 91, 59 S. Ct. 21, 83 L. Ed. 60; *Young v. Territory of Hawaii,* 160 F. 2d 289.

This Court in the *Stevens* case, *supra,* on page 212 stated:

> "This Court adheres strictly to its limited power to review a decision of the Supreme Court of Hawaii. The instant decision must be accepted insofar as it is in conformity with the Constitution and applicable statutes of the United States and is not patently erroneous in statement or application of governing principles. . . . *We will not impose our preference for a rule of law upon Hawaii.* Therefore, *this Court will not interfere unless there has been a clear departure from ordinary legal principles."* (Emphasis added.)

In the *Victoria Ward* case, *supra,* this Court maintained its aloofness because there was no showing of "manifest error."

Likewise, in the criminal case of *Young v. Territory of Hawaii, supra,* this Court refused to test the decision of the Hawaii court in permitting its trial court to charge the jury with a somewhat confusing definition of reasonable doubt. This Court stated the following on page 290:

> ". . . The due process clause of the Fourteenth Amendment 'leaves the states free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem

> appropriate. . . .' And the same holds good of the Fifth Amendment in respect of the administration of the criminal laws of the Territory of Hawaii. . . ."

Based upon the precedent established by this Court of Appeals it is respectfully submitted that appellant cannot here renew his argument that free games won on a pin ball machine do not constitute "anything of value," and that the phrase, "any other game," contained in Section 11343 of the *Revised Laws of Hawaii,* 1945, included such games as that played on pin ball machines.

However, the Supreme Court of Hawaii decided to construe the meaning of the two phrases in question is a matter peculiar to its own jurisdiction. Appellant, in order to renew his argument before this Court, must show that the court below was in grave error. This he cannot do, for there is sufficient authority to sustain the position taken by the Hawaii court. Among the authorities which construed the phrases as did the Hawaii court are the following:

Baedaro v. Caldwell, 156 Neb. 489, 56 N.W. 2d 706 (1953);

Eccles v. Stone, 134 Fla. 113, 183 So. 628 (1938);

Middlemas v. Strutz, 71 N.D. 186, 299 N.W. 589 (1941);

Prickett v. State, 200 P. 2d 457; Rehearing Denied, 201 P. 2d 798 (Okla. 1949);

People v. Gravenhorst, 32 N.Y.S. 2d 760 (N.Y. 1942);

State v. Bally Beach Club Pinball Machine, 119 A. 2d 876 (Vt. 1956);

State v. Langford, Tex. Civ. App., 144 S.W. 2d 448 (Tex. 1940);

Thamart v. Moline, 66 Idaho 110, 156 P. 2d 187 (1945);

Westerhaus, Inc. v. City of Cincinnati, 127 N.E. 2d 412, Aff'd 165 Ohio St. 327, 135 N.E. 2d 318 (1956).

These cases, decided under statutes specifically using the terms, "thing of value," "other thing," or "anything of value," have held that free games won on pin ball machines were within the meaning of those statutory terms:

Antrim v. State, 92 Okla. Cr. 91, 220 P. 2d 846 (1950);

Broaddus v. State, 141 Tex. Cr. Rep. 512, 150 S.W. 2d 247 (1941);

Giomi v. Chase, 47 N.M. 22, 132 P. 2d 715 (1942);

Hightower v. State, Tex. Civ. App. 156 S.W. 2d 327 (1941);

People v. Cerniglia, 11 N.Y.S. 2d 5 (1939);

Prickett v. State, 88 Okla. Cr. 232, 201 P. 2d 798 (1949);

Rankin v. Mills Novelty Co., 182 Ark. 561, 32 S.W. 2d 161 (1930);

State v. Paul, 43 N.J. Super. 396, 128 A. 2d 737 (1957);

Steely v. Commonwealth, 291 Ky. 554, 164 S.W. 2d 977 (1942).

These cases, decided under statutes prohibiting gambling or gambling devices, held that free games won on pin ball machines are "things of value":

Alexander v. Martin, 192 S.C. 176, 6 S.E. 2d 20 (1939);

Couch v. State, 110 P. 2d 613 (Okla. 1941);

People v. One Pinball Machine, 316 Ill. App. 161, 44 N.E. 2d 950 (1942);

State v. Doe, 242 Iowa 458, 46 N.W. 2d 541 (1951);

State v. Wiley, 232 Iowa 443, 3 N.W. 2d 620 (1942).

See also:

Calcutt v. McGeachy, 213 N.C. 1, 195 S.E. 49 (1938);

Harvie v. Heise, 150 S.C. 277, 148 S.E. 66 (1928);

Henry v. Kuney, 280 Mich. 188, 273 N.W. 442 (1937);

Holliday v. Governor of State of South Carolina, 78 F. Supp. 918 (1948);

Kraus v. City of Cleveland, 135 Ohio St. 43, 19 N.E. 2d 159 (1939);

Painter v. State, 163 Tenn. 627, 45 S.W. 2d 46, 81 A.L.R. 173 (1932);

Stanley v. State, 194 Ark. 483, 107 S.W. 2d 532 (1937);

State v. Baitler, 131 Me. 285, 161 Atl. 671 (1932);

State v. One 5¢ Fifth Inning Baseball Machine, 3 So. 2d 27 (Ala. 1941).

There is no dispute that authority can be presented disagreeing with the construction as rendered by the court below. It is conceivable that this Court, like appellant, is likewise in disagreement with the decision in *Territory v. Uyehara,* 42 Haw. 184. However that may be, it is respectfully submitted that, for want of proper jurisdiction in that particular, appellant's Specification of Error No. 1 should be dismissed.

B. FREE GAMES WON ON A PIN BALL MACHINE CONSTITUTE "ANYTHING OF VALUE" AS PROVIDED BY SECTION 11343, REVISED LAWS OF HAWAII, 1945.

In the event this Court entertains jurisdiction as to appellant's Specification of Error No. 1, the following argument is included in this brief.

It is respectfully submitted that the majority and better reasoned rule is that free games won on a pin ball machine constitute "anything of value" within the meaning of Section 11343, *Revised Laws of Hawaii,* 1945, (now Section 288-4, *Revised Laws of Hawaii,* 1955).

1. Statute and Definitions.

The statute in question provides as follows:

> "Playing prohibited games. Every person who deals, plays, or carries on, opens or causes to be opened, or who conducts either as owner or employee, whether for hire or not, any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game played with cards, dice or any device for money, checks, credit or any repre-

sentative of value or any other game in which money or *anything of value* is lost or won, and every person who plays or bets at or against any such prohibited game or games, and every person present where such game or games are being played or carried on, is guilty of a misdemeanor." (Emphasis supplied.) Sec. 11343, *R.L.H.* 1945.

The word "anything," when used as a noun, has been defined as a "thing of any or whatever kind." *Webster's New Int. Dict.,* 2d Ed.

The word "thing" though relating to physical objects when taken in its narrower sense, yet when used in a broader sense includes that which is intangible. In this latter context it has been defined as:

" 2c. A happening; event; circumstance; . . .

" 3. Something accomplished or to be accomplished; a deed, act, or transaction; . . .

" 4b. The end or aim of effort or activity; . . .

" 5. Whatever exists, or is conceived to exist, as a separate entity, or as a distinct and individual quality, fact, or idea; any separable or distinguishable object of thought; anything at all; as there is a name for every *thing." Webster's New. Int. Dict.,* 2d Ed.

The word "value" has been defined as:

" 1. A fair return in money, goods, services, etc., for something exchanged; that which is considered an equivalent in worth; as, to get the *value* of one's money in a purchase; to recover the *value* of lost merchandise.

" 2. Monetary worth of a thing; . . .

"5. Relative worth, importance, or utility; degree of excellence or usefulness; status in a scale of preferences or the like; . . .

"14d. The estimate which an individual places upon some of his possessions as compared with others, independently of any intent to sell;—sometimes called *subjective value,* or, less correctly, *value in use,* and employed in a loose sense as nearly equivalent to *utility.*" *Webster's New Int. Dict.,* 2d Ed.

"The utility of an object in satisfying, directly or indirectly, needs or desires of human beings, called by economists 'value in use;' or its worth consisting in the power of purchasing other objects, called 'value in exchange.'" *Black's Law Dict.,* 3d Ed.

The phrase "any . . . thing of value" has been held to be not limited to tangibles:

". . . Character, esteem, appreciation, reputation and good will are definitely things of value to those who possess them. The word 'thing' is defined as that which is or may become the object of thought; that which has existence or is concerned or imagined as having existence; any object, substance, attribute, idea, fact, circumstance, event, etc. A thing may be material or ideal, animate or inanimate, actual, possible or imaginary. Words and Phrases, Perm. Ed., p. 558; Funk & Wagnalls New Standard Dictionary; The Century Dictionary and Cyclopedia; Webster's Universal Unabridged Dictionary. The same authorities define 'value' as the 'estimate of the intrinsic worth of a thing; appreciation, esteem, valuation.' A political benefit which a defendant

expected to receive for reinstating a constituent was held to be embraced within the clause, 'value of any kind'. People ex rel. Dickinson v. Van De Carr, 87 App. Div. 386, 389, 84 N.Y.S. 461, 463. In construing the same clause the court in People v. Hyde, 156 App. Div. 618, 141 N.Y.S. 1089, 1093, held that something of value must flow to defendant, not necessarily of pecuniary or intrinsic value, but value in the sense of a personal advantage of some sort.

"With these concepts in mind, this court is constrained to hold amusement a thing of value when applied to devices of this type [pin ball machines]. A thing of value to be the subject of gaming may be anything affording the necessary lure to indulge the gambling instinct. . . ." *People v. Gravenhorst, supra,* pp. 774-775.

Text authorities also have discussed the meaning of the term "thing of value" as applied to coin operated devices of the type in question:

". . . The term 'thing of value,' as used in statutes prohibiting, in effect, coin operated slot machines upon which such a thing may be won or played for, has been construed by some courts to include additional plays automatically won on machines commonly referred to as pinball marble, or bagatelle game machines so as to render these machines unlawful by reason of such charges, notwithstanding that no tokens, slugs, checks, or the like are used in connection with the replays, and even though no money, prizes, or similar awards are made to successful players . . ." 24 *Am. Jur., Gaming & Prize Contests,* Sec. 35, Supp., p. 43.

> "*Thing of value or valuable thing.* The phrase has been held to include amusement generally and particularly that afforded by the 'free game' feature of some gaming devices, and more specifically where the amount of amusement is determined by chance or hazard." 38 *C.J.S., Gaming,* Sec. 1, p. 72.

The reasoning upon which the foregoing holdings are premised, when applied to free games won by a player upon a pin ball machine, is that such free games constitute *amusement,* and amusement is a "thing of value." If a player is willing to insert a nickel in the machine to play one game, then that game has a value of five cents to him—its equivalent worth—otherwise he would not part with his money to play such a game. As to him the game has "utility" in that it directly or indirectly satisfies his want for amusement. Though such amusement has no "value in exchange" in the sense that it can be bought, sold, transferred or exchanged like merchandise, money or choses in action, yet it has a subjective value or "value in use" to the player. It follows that if one game is worth five cents to a player, then additional free games which he may win by playing such a pin ball machine and obtaining a certain score thereon are worth at least five cents apiece. They constitute additional amusement in the same form and kind as purchased with the original five cents and hence have additional value. The possibility of winning such free games is the inducement for the player to insert his original five cent coin to play the machine.

The fact that some people might not place any value upon such a form of amusement is no criteria in determining whether they do or do not constitute value within the meaning of our gaming statute. Most people have different tastes and preferences for amusement. Some like theatres, television, radio, sports, reading or other pastimes. It is enough for purposes of the statute in question that some people consider amusement derived from playing a pin ball machine sufficiently valuable to deposit their money in such machines in the hope and expectation of receiving additional free games upon attaining a certain score.

In this connection it has been held with respect to a machine which upon the insertion of a coin and pulling of a lever a package of mints is ejected along with a varying number of slugs or tokens which can be reinserted into the machine for additional free replays:

> "Amusement is a thing of value. Were it not so, it would not be commercialized. The less amusement one receives, the less value he receives, and the more amusement, the more value he receives. Whoever plays the device and obtains tokens therefrom receives more value for his nickel, with respect to the amount of amusement obtained, than the player who receives none at all. The player who receives ten tokens receives more value for his nickel, with respect to the amount of amusement, than the player who receives only two. The player who receives fifty tokens receives more value for his nickel, with respect to the amount of amusement, than the player who receives only ten tokens. However, the number of

tokens a player may receive is wholly dependent upon chance. Consequently, the amount of amusement a player receives for his nickel, by virtue of the return of the tokens, is dependent wholly upon chance. The greater the amount of amusement received, the more valuable the prize.

"The minimum amount of amusement offered in each play is that which is offered without any return of tokens. Whatever amusement is offered through the return of tokens is added amusement which a player has an uncertain chance of receiving. This added amount of amusement, the procurement of which is dependent wholly upon chance, is a thing of value [citing cases], the lure extended by the device to the player.

"As well said in the opinion in Myers v. City of Cincinnati, 128 Ohio St. 235, 190 N.E. 569, 570: 'These decisions [holding certain slot machines to be gambling devices] appear generally to be based on the theory that devices of this kind encourage and stimulate the gambling instinct of receiving something for nothing, or more for less, and are in such contravention of sound public policy as to come within laws relating to gambling and the exhibition of gambling devices. . . .'" *Kraus v. City of Cleveland, supra,* pp. 160-161.

As applied to gaming devices, a "thing of value" to be the subject of gambling may be any "thing" affording the necessary lure to individual gambling instincts, that is, the receiving of something for nothing, or more for less. *Heartley v. State,* 178 Tenn. 254, 157 S.W. 2d 1, 3 (1941); *Steely v. Commonwealth, supra,* p. 980; *People v. Gravenhorst, supra,* p. 775;

Colbert v. Superior Confection Co., 154 Okla. 28, 6 P. 2d 791, 793 (1931).

2. History of Gaming Devices and Cases.

It is submitted that the weight of authority holds amusement to be a thing of value as applied to pin ball or marble machines and that additional free games won on such machines constitute amusement and hence are "anything of value."

In this connection it should be noted that there are a number of early cases applying the principle in question to machines that were somewhat similar to and which were the predecessors of the pin ball machines now under consideration, these machines being known as the "Mills" type of mint vending machines. These mint vending machines were but one of a procession of machines which since the turn of the century have been introduced to the public by the slot machine interests and have ultimately received judicial condemnation by the courts. The history of these machines and their subsequent encounters with the law is graphically illustrated in *People v. Gravenhorst, supra,* pp. 764-765.

In that case the court discussed the familiar one-armed bandit, which paid off to the winner in actual money and which was soundly denounced by the courts.

To nullify the effects of such judicial censure, the slot machine interests eliminated the pay-offs in money and substituted therefor the return to the successful player of additional merchandise, slugs or tokens, the

latter being exchangeable for games, mints, cigars, etc. These machines were also condemned by the courts.

In a further ramification designed to avoid judicial disapprobation based upon the element of chance incorporated into such slot machines, the manufacturers proceeded to introduce a device that would indicate to the operator in advance exactly what the pay-off would be. This subterfuge, however, was held to be of no avail, inasmuch as the player gambles not so much on the immediate return but on the expectation that the indicator will show an opportunity for profit on his next play. Such a machine was stricken down by the New York courts and also by this Court in *Territory v. Beeson,* 23 Haw. 445 (1916).

Turning to the mint vending machines of the Mills type, the court in *People v. Gravenhorst, supra,* states further at page 765:

> "In their ceaseless endeavors to circumvent legislative and judicial condemnation, the contrivers next developed a machine resembling a cash register with a lever on the side, and in the front, a column of packages of mints. Upon the deposit of a coin and the operation of the lever a package of mints was released. In addition the machine caused three cylinders to revolve at different rates of speed. Upon each cylinder were certain symbols and an incomplete sentence. The inscriptions on the three, however, when the cylinders ceased to spin and when these inscriptions were read together, formed complete sentences of a humorous vein. These machines sometimes delivered metal tokens which were purported to have no cash or trade in value and to be capable of use only

for further amusement. These types of machines were declared illegal in numerous State and Federal decisions. [Citing cases.] . . ."

A number of cases including some of those cited in the *Gravenhorst* decision, *supra,* have held that the slugs or tokens won on such devices represent the right to continue the operation of the machine and hence were "things of value" within the meaning of statutes directed against gaming. *Painter v. State, supra; Howell v. State,* 184 Ark. 109, 40 S.W. 2d 782 (1931); *Rankin v. Mills Novelty Co., supra; State v. Baitler, supra,* p. 286; *Harvie v. Heise, supra; Heartley v. State, supra.* See also: *Ross v. Goodwin,* 40 F. 2d 535 (D.C., N.H.); 24 *Am. Jur., Gaming & Prize Contests,* Sec. 35, *supra.*

Though the mint vending machines just described are not precisely the same in construction and operation as pin ball machines, yet the principle of law involved applies to each type of machine with equal force. From a mechanical standpoint, the only difference between mint vending machines and pin ball machines is in the method of obtaining the free play. In the mint vending machine the mechanism emitted slugs or tokens, which, though of no intrinsic value in themselves, entitled the player to a free play, said right being attained by inserting the slugs or tokens back into the machine and securing additional replays thereon. In contradistinction to this, the more modern pin ball machines in use today emit no slugs or tokens. However, by virtue of the mechanism within a pin ball machine, free games when won by the player

upon attaining a certain score are registered automatically on the machine by an indicator, counter, illuminated numerals or other device, and the games are then played off automatically. In principle, this difference in the method of awarding the free games to the player is immaterial, since on either machine the player receives additional amusement which is contingent upon chance or upon his attaining a certain score. The additional free plays in both cases constitute amusement and hence "a thing of value" within the meaning of statutes directed against gaming.

In this connection it has been said:

> ". . . 'It matters little whether this right was evidenced by tokens or by an automatic recorded score. . . ." *People v. One Pinball Machine, supra,* p. 954.

See also *Alexander v. Martin, supra.*

In discussing the early Ohio case of *Kraus v. City of Cleveland, supra,* wherein the machines therein considered were the Mills type of mint vending machine, it was held in a later decision, *Westerhaus, Inc. v. City of Cincinnati,* 127 N.E. 2d 412, 416 (1955), aff'd 165 Ohio St. 327, 135 N.E. 2d 318 (1956), relating to pin ball machines with the free game element:

> " . . . As to this feature of the case, the only distinction between the Kraus case and the present case is that the right to replay the game in the Kraus case was dependent upon receiving a token from the machine when the established score was reached, whereas in the present case the right to

> replay is established automatically without a token. The distinction is immaterial. The Kraus case was not decided upon this fine distinction of mechanics, but upon the principle that the *right* to replay the game constituted amusement and that *amusement* was a thing of value. Certainly the token which was merely the mechanical means by which the machine could be replayed, was of no inherent value in itself. The right to amusement afforded by the machine considered in the Kraus case is indistinguishable from the right to amusement afforded by both of the machines considered in the present case. . . ."

In short, the decisions of many jurisdictions passing upon the mint vending machines under gambling statutes using the term "thing of value" sustain the proposition that additional amusement in the form of free replays on such machines constituted "things of value." Those decisions are also applicable to the case before the Court in relation to pin ball machines.

Turning to the cases which pass upon the question of whether free games won on pin ball machines constitute "things of value" it will be helpful to note that these cases fall into two broad categories:

(a) Those involving statutes which prohibit gaming, gambling or gambling devices generally without defining such terms and in which the court must resort to generally accepted definitions of those terms which in themselves contain the term "thing of value;" and

(b) Those involving statutory definitions of gambling or gaming and specifically use the terms "thing of value," "other thing," "any thing of value," etc.

In respect to the first of the aforementioned classifications it has been held under statutes prohibiting gaming, gambling or gambling devices that free games won on pin ball machines are "things of value" within the judicial definitions of gaming, gambling or gambling devices. *State v. Wiley,* 232 Iowa 443, 3 N.W. 2d 620 (1942); *State v. Doe,* 242 Iowa 458, 46 N.W. 2d 541 (1951); *People v. One Pinball Machine, supra,* but see *People v. One Mechanical Device,* 142 N.E. 2d 98 (1957); *Alexander v. Martin, supra; Westerhaus, Inc. v. City of Cincinnati, supra.*

Thus it was held in *State v. Wiley, supra,* that a pin ball machine awarding free games to a player who attained a certain score thereon was a gambling device within the purview of a statute which forbade the possession of any "roulette wheel, klondyke table, poker table, punch board, faro, or keno layouts or any other machines used for gambling or any slot machine or device with an element of chance attending such operation."

The court was of the opinion that:

> "If free plays of a mint-vending machine are things of value, it seems logical that free games upon a device such as those described in the indictment in this case are likewise things of value. Various authorities sustain this conclusion. As a matter of fact the play of the mint-vending machine presumably is merely accessory to the purchase of mints. The coin inserted in the pin ball machine presumably is paid solely for the amusement of operating the machine. Thus, the coin measures the value of the game. Therefore, a free game upon the latter machine has a definite fixed

> value. If one game is worth a nickel, it is clear that additional games are things of value. And the rule is the same whether the machine emits discs with which it can be replayed or works automatically as in the case at bar." *State v. Wiley, supra,* pp. 622-623.

The court finally held that free games won on such machines were "things of value."

The foregoing case was followed in *State v. Doe, supra,* where in an action to condemn a pin ball machine as a gambling device, though the evidence in the trial court disclosed that no free games were given and that only a certain score could be attained, it was held that the machine was a gambling device. The only conclusion that the court could reach from the fact that extra points could be obtained by means of a feature which built up odds in the machine was that the score may be used to obtain money or other things of value. This feature supported the finding of the trial court that the machine was adapted and designed as a gambling device. In the opinion the court stated further that the machine was exhibited during the oral argument in the Supreme Court where members of the court played it and found that it awarded free games. In this connection the court held:

> " . . . The free game feature, which, the record indicates, was not shown in the trial court, in and of itself would stamp the machine as a gambling device . . ." *State v. Doe, supra,* p. 545.

In *People v. One Pinball Machine, supra,* in a proceeding against a pin ball machine with the free game

feature under a statute providing "Every . . . slot machine or other machine or device for the reception of money on chance or upon the action of which money is staked, hazarded, bet, won or lost is hereby declared a gambling device" it was held that:

> " . . . Amusement is recognized by the Courts as a thing of value, and where the amount of amusement given by the player of a machine is determined by chance or hazard, such machine is held to be a gambling device." *People v. One Pinball Machine, supra,* p. 954.

The holding in this case apparently construed the statute just cited with another section which provided penalties for operating, keeping, owning, renting or using the above named device and includes in the same descriptive language after the word "money" the words "or other valuable thing." The court in quoting the case of *Kraus v. City of Cleveland, supra,* held amusement to be a thing of value, and were it not so it would not be commercialized.

The statute has been amended since the foregoing decision was rendered and exempts slot machines of the pin ball type which award free games in that it specifically provided that the right of free replays won thereon shall not represent a "valuable thing."

On the basis of such amendment it was held in *People v. One Mechanical Device, supra,* that such pin ball machines did not contravene the statute, and without overruling *People v. One Pinball Machine, supra, by way of dictum* held that a free play was "neither money, the equivalent of money, nor a valuable thing."

For these reasons it is submitted that the case does not necessarily overrule *People v. One Pinball Machine, supra.*

In *Alexander v. Martin, supra,* noted 26 Va. L. R. 955 (1940), plaintiff brought an action to restrain defendant sheriff from seizing and confiscating plaintiff's pin ball machines which awarded free games. The statute prohibited anyone from keeping on his premises, operating, etc., any vending or slot machine (both types being specifically described) or other device pertaining to games of chance of whatever name or kind. In holding that pin ball machines were gambling devices the court held that it was clear that the lure and inducement for a player to operate the machine was the chance of occasionally being allowed to play a game or games without additional cost. In quoting *Kraus v. City of Cleveland, supra,* the court held that amusement is a thing of value and that the less amusement one receives the less value he receives, and the more amusement the more value he receives. The court was also of the opinion that slot machines of this kind encouraged and stimulated the gambling instinct of receiving something for nothing or more for less and were therefore in contravention of sound public policy and laws relating to gambling.

Similarly, in *Westerhaus, Inc. v. City of Cincinnati, supra,* where in an action for declaratory judgment and for equitable relief to prevent defendant law enforcement officers from seizing and confiscating pin ball machines with the free game element, it was held that the machines were gambling devices per se. The

right to a free replay constituted a prize sufficient to bring it within the meaning of the law relating to gambling devices. The court held the case of *Kraus v. City of Cleveland, supra,* controlling and that the facts of the case disclosed three elements of gambling, namely, chance, prize and price.

> "Since amusement has value, and added amusement has additional value, and since it is subject to be procured by chance without the payment of additional consideration therefor, there is involved in the game three elements of gambling, namely, chance, price and a prize." *Westerhaus, Inc. v. City of Cincinnati, supra,* p. 417.

Turning to cases decided under statutes which define gambling and gaming and which specifically use the terms "thing of value," "other thing," "anything of value," etc., it has been held that free games won on pin ball machines were within the meaning of those statutory terms. *Broaddus v. State, supra; State v. Langford, supra; Hightower v. State, supra; Steely v. Commonwealth, supra; People v. Cerniglia, supra; People v. Gravenhorst, supra; Prickett v. State, supra; Antrim v. State, supra; State v. Paul, supra; Giomi v. Chase, supra.*

For instance in *Broaddus v. State, supra,* wherein the defendant was convicted of keeping and exhibiting a slot machine where money or other thing of value is bet thereon, to wit, a pin ball machine which awarded free games to the winner, it was held that such free games constituted a thing of value within the terms of a statute prohibiting the keeping or exhibiting for the purpose of gaming any slot machine

or table of any kind, and which further provided that "any such table . . . machine or device shall be considered as used for gaming, if money or anything of value is bet thereon." The court held that anything that contributed to the amusement of the public is a thing of value.

> "We think the free games offered by the machine in question were things of value within the statute . . ." *Broaddus v. State, supra,* p. 251.

The foregoing decision followed an earlier civil case, *State v. Langford, supra,* which in an *in rem* action to destroy certain marble machines held that free games won on such machines constituted a thing of value. Followed in *Hightower v. State, supra.*

In *Steely v. Commonwealth, supra,* under a statute making it unlawful for anyone to set up, carry on, keep, manage, operate or conduct, or assist therein a keno bank, faro bank or other machine or contrivance used in betting whereby money or "other thing" may be won or lost, it was held that free games won upon a pin ball machine were "other things" which may be won or lost within the terms of the statute.

> ". . . The 'other thing' which may be won or lost is not confined to money, nor to corporeal articles of money value. Also it is true that the winning of the right to a replay without any additional deposit possesses the value of a nickel, the amount of its cost. Therefore, the player, if successful, wins the value of a nickel as invested in such an engagement. But there is also a plus value, which is the chance of obtaining another or a number of other free rights to additional

plays. . . .'' *Steely v. Commonwealth, supra,* pp. 978-979.

In *People v. Cerniglia, supra,* where the defendant was charged with violating Section 982 of the *New York Penal Law* for possessing and permitting the operation of slot machine placed under his management and control, said machine being a pin ball machine offering free games. It was held that the machine violated the statute which prohibits possessing and permitting the operation in any room, space or building under a person's management or control of any slot machine or device pursuant to which the user thereof, as the result of any element of chance or other outcome unpredictable to him, may be entitled to receive any money, credit, allowance or thing of value or additional chance or right to use such machine.

> ''This court is not misled by the apparent harmlessness of awarding a free game. This is but an incentive that fosters the gambling spirit similar to that awarding tokens, prizes, etc. The element of chance is always present. 'Combining the element of chance with the inducement of receiving something for nothing results in gambling' . . . 'A ''thing of value'' to be the subject of gaming may be ''any 'thing' affording the necessary lure to indulge the gambling instinct.'' ' . . .'' *People v. Cerniglia, supra,* p. 7.

The foregoing decision was followed in *People v. Gravenhorst, supra,* which is construing the same statute held that free games won on a pin ball machine constituted a ''thing of value'' within the meaning of

Section 982 of the *New York Penal Law.* In a lengthy and well reasoned opinion the court discussed the history of slot machine devices and the continuous attempts by their manufacturers to avoid the effect of judicial condemnation by ingenious ramifications and modifications. The court analyzed in detail the mechanical features of the machine in question and found the machine to be "adapted for use" in such a way that after inserting a coin the machine may be operated and as a result of an element of chance the user may become entitled to a "thing of value." A "thing of value" was held to include free games won on such pin ball machine.

In *Prickett v. State, supra,* under a statute prohibiting machines by which a person will stand to win or lose a thing of value, a thing of value being defined by statute as being "any money, coin, currency, check, clip, token, credit, property, tangible or intangible, amusement or any representative of value, calculated or intended to serve as an inducement for anyone to operate or play any slot machine or punch board," it was held that free games won on a pin ball machine constituted amusement which was a thing of value as defined by statute.

In the case of *Antrim v. State, supra,* p. 848, where the defendant was charged with the unlawful operation of a slot machine, to wit, a pin ball machine that awarded free games, it was held:

> ". . . In accordance with that opinion [*Prickett v. State, supra*] it is the established law that under the 1939 enactment the operation of pin ball

machines was illegal regardless of whether they gave free games for a high score."

The statute in Oklahoma has since been amended to exclude amusement or entertainment as being a thing of value within the meaning of such statute. However free games still constitute property under the original 1939 statute. See *State v. Sandfer,* 93 Okla. 228, 226 P. 2d 438 (1951).

In *State v. Paul, supra,* wherein the defendants were indicted for owning and operating pin ball machines giving free games to the player attaining a certain score, it was held under a statute prohibiting any person from keeping a slot machine or device in the nature of a slot machine on his premises "which may be used for the playing of money or other valuable thing" that free games were within the provision of the statute "other valuable thing." The court stated that "Anything that contributes to the amusement of the public is a *thing of value." State v. Paul, supra,* p. 741. The court further held that the gambling statutes were written long before the pin ball machines were invented, and though legislation could have specifically provided for the pin ball machine situation yet the trend of decisions indicates that such machines are basically against public policy, citing many numerous cases involving devices which complied with the letter but not the spirit of the law in the field of vice and gambling. The court held that these machines fostered the gambling spirit and that free games won thereon were things of value and the machines were operated in contravention of the law.

Finally in *Giomi v. Chase, supra,* it was held that free games awarded to a player of a pin ball machine constituted anything of value within the meaning of a statute similar to the Hawaii statute under consideration. The statute provided:

> "It shall hereafter be unlawful to play at, run or operate any game or games of chance such as keno, faro, monte . . . roulette . . . fan tan, poker . . . or any other game or games of chance played with . . . slot machines or any other gaming device by whatsoever name known, for money or anything of value . . ." *Giomi v. Chase, supra,* p. 716.

In a well-reasoned opinion the court held that amusement is a thing of value in that the right to a free replay on such a machine is a thing of value within the meaning of the statute directed against gaming.

> ". . . The player at a pinball machine proves it when he deposits his five cent coin for the privilege of playing it. And the correctness of the assertion is but emphasized if the lure and inducement to the first play spring from the hope that before it is ended, luck will favor the player by awarding him additional free games. If, as one of the quoted opinions says, the prize were a theatre ticket, none would question it as constituting value. The fact, however, that the stake won is small does not alter the verity of the principle involved." *Giomi v. Chase, supra,* p. 719.

The term "anything of value" includes a multitude of items tangible and intangible. In this connection it said:

> "... The legislature itself makes no distinction between the kinds of value meant and it is not the province of the courts to do so. The rather harmless and innocent character of the amusement afforded the player on the machine in question may suggest to some that it ought to be outside the interdiction of the statute. The legislature has thought otherwise and the matter being one of policy the courts can have no proper concern therewith." *Giomi v. Chase, supra,* p. 719.

It is submitted that the holdings in the foregoing decisions are the majority and better view based on reason and principle. The last mentioned quotation from *Giomi v. Chase, supra,* clearly answers the reasoning found in contrary decisions to the effect that free games are not things of value since no one, unless he possessed a vacuous mind, could find such silly amusement valuable. Concededly the persons who find such amusement valuable are probably not of the highest intellectual calibre, yet they are the very people the law aims to protect from the insidious appeal that such machines make to the gambling instinct which is found in so many human beings. The aim of the gambling laws is to protect the weaker members of society from their own foibles. Hence, the law makes no distinction as to the kinds of value meant nor is it in the province of the courts to do so.

3. Analysis of Appellant's Cases.

The appellant has cited several cases in support of his position that free games do not constitute things of value. A case heavily relied upon is that of *Gayer*

v. Whelan, 59 Cal. App. 2d 255, 138 P. 2d 763 (1943), a civil action against the district attorney for possession of pin ball machines seized as lottery or gambling devices. The pin ball machine involved awarded free games to the player who won a certain score. It is submitted that the case is distinguishable from the situation at bar for the following reasons:

First, the provision of Section 11343, *Revised Laws of Hawaii,* 1945, under which the appellant, David Naumu, is charged to wit: "or any other game in which money or anything of value is lost or won" does not appear in Section 330-A of the *Penal Code of California* cited in the *Gayer v. Whelan* case. The absence of such a provision in the California statute is a crucial point distinguishing the two cases.

Second, the phrase interpreted and construed by the court in *Gayer v. Whelan, supra,* was "representative or articles of value" and not "anything of value." The question in that case was succinctly stated by the court on p. 766 as follows:

> ". . . Does the amusement afforded by a free game, or games, awarded the player for a high score amount to 'merchandise, money, *representative or articles of value,* checks, or tokens, *redeemable in, or exchangeable* for money or any other thing of value'? . . ." (Emphasis added.)

In discussing the question the court was of the opinion that the word, " 'representative' . . . would have to represent or stand for some inanimate object which the player would receive as a reward for the high score." The word "article" meant "some mate-

rial or tangible object," and that free games being intangible were not within the meaning of such word. In conclusion the court made the following statement:

> "Under the foregoing rules of statutory construction we are required to hold that the clause of section 330a of the Penal Code, under consideration must mean that the *representative, or article of value,* obtained through a high score on the pin ball machine, must be some material or tangible thing of value, and that securing the amusement of a free game or games on the machine, and nothing more, does not come within *that* definition and is not within the prohibition of the section." (Emphasis added.) *Gayer v. Whelan, supra,* p. 768.

Hence, *Gayer v. Whelan, supra,* is inapplicable to the case now before the Court.

The case of *In re Wigton,* 151 Pa. Super. 337, 30 A. 2d 352, cited by the appellant is probably the only case holding squarely that free games won upon pin ball machines do not constitute things of value. Analysis of that decision, however, discloses that the reasons cited by the court merely beg the question. The court holds:

> ". . . Syllogistically if the player enjoys the play enough to pay money for the privilege the right to play has some value to him. But to come within the Act, it must not merely have value to him; it must be a thing of value . . ." *In re Wigton, supra,* p. 354.

This reasoning is self-contradictory, since to be a "thing of value" it must be valuable to someone, and that someone can only be the player. If he is willing

to pay a nickel for the possibility of winning it must be a thing of value to him and to him alone. The fact that the court itself may not consider such amusement as being valuable is immaterial since different people place different values upon different types of amusement. The members of the Pennsylvania court may have valued a game of golf or bridge more than the persons who played the pin ball machines in question. But the court overlooked the fact that the legislature did not distinguish between the kinds of value meant and that it is not the province of the courts to do so. *Giomi v. Chase, supra.* It is submitted that it is enough that some people value free games won on a pin ball machine sufficiently to part with money in order to obtain the chance to win them.

Appellant also cites the case of *State v. Betti,* 23 N.J. Misc. 169, 42 A. 2d 640 (1945). The machine in question in said case is different from the one at bar in that it "contained no device for the recording or the awarding of free games upon the achievement of a designated high score." Consequently, the only question therein was whether the fact that the machine could be arranged to provide from one to three free games by making certain mechanical changes therein constituted a violation of the statute which prohibited any slot machines which may be used for the playing of "money or other valuable thing." The court held that the machine was violative of the statute but on the grounds just cited.

The court distinguished *Hunter v. Teaneck,* 128 N.J.L. 164, 24 A. 2d 553 (1942), where a pin ball

machine awarding free games was considered, and held that the right to receive free games won on such a machine was in violation of the gambling statute.

The law of New Jersey on the question of free games won on a pin ball machine as constituting a thing of value has been laid down in the case of *State v. Paul, supra,* already discussed, which holds such free games to be things of value.

Appellant also cited the case of *Mills Novelty Co. v. Farrell,* 64 F. 2d 476 (1933), involving a mint vending machine. The statute therein prohibited the playing of any game for any valuable thing. The court was of the opinion that the possibility of receiving additional humorous sayings upon the machines was not a sufficient lure to the gambling instincts but was rather an advertising feature which attracted customers. Hence, such a machine was not a gambling device. The reasoning of the court and the type of machine involved distinguish that decision from the instant case.

The case of *Washington Coin Mach. Ass'n v. Callahan,* 142 F. 2d 97 (C.A., D.C. 1944), and *Davies v. Mills Novelty Co.,* 70 F. 2d 424 (1934) are not applicable to the question involved in this appeal since the statutes in each case were "property" statutes and did not use the term "thing of value." Hence the cases are no authority for the proposition cited by the appellant.

In summary, except for the case of *In re Wigton, supra,* the cases cited by the appellant can be distinguished from the instant case on the basis of the

reasoning or the statute involved. As previously stated the reasoning of the Pennsylvania court in *In re Wigton, supra,* merely begs the question. For a thing to be of value it must be of value to someone—and the statute makes no requirement as to who that someone must be. It is submitted that if it has value to anyone then that is sufficient to bring the game within the meaning of the statute.

4. History and Analysis of the Gambling Statute.

Section 11343, *Revised Laws of Hawaii,* 1945, had its origin in Section 1 of Chapter XL of the *Penal Code* of 1850, relating to gambling which provided:

> "Whoever by playing at cards, or any other game, wins or loses any sum of money or thing of value is guilty of gaming."

Chapter XL provided criminal penalties and civil remedies, the latter remaining practically unchanged in our present law. Section 1, already referred to, was amended in minor respects by later acts (Chapter V, *Sessions Laws of Hawaii,* 1870, and Chapter XLI, *Sessions Laws of Hawaii,* 1890). Except for the sections relating to civil remedies all of the laws relating to gaming were repealed and reenacted in their present form by Act 21, *Laws of Provisional Government,* 1893-4. This repeal and reenactment of the gaming laws grew out of the revolution of 1893 wherein the monarchy of Queen Liliuokalani was overthrown. The enactment of Act 21 was a reaction to the excesses of the legislature and monarchy in its enactment of the opium and lottery bills and the attempt by Queen

Liliuokalani to abrogate the then existing constitution and to promulgate her own constitution.

The enactment of Section 11343, *supra,* clearly shows that the framers intended to prohibit all forms of gambling then known and which would thereafter be invented or devised.

As hereinbefore stated, the original act prohibited one enumerated type of game, to wit, cards, and then prohibited any other game wherein any other sum of money or thing of value could be won or lost. The new act was more detailed and comprehensive in its scope and provided as follows:

> "Sec. 11343. Playing prohibited games. Every person who deals, plays, or carries on, opens or causes to be opened, or who conducts either as owner or employee, whether for hire or not, any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game played with cards, dice or any devise for money, checks, credit or any representative of value or any other game in which money or anything of value is lost or won, and every person who plays or bets at or against any such prohibited game or games, and every person present where such game or games are being played or carried on, is guilty of a misdemeanor." (*R.L.H.* 1945.)

Upon analysis, the prohibitions of Section 11343, *supra,* appear to be directed at "every person who deals, plays, or carries on, opens or causes to be opened, or who conducts either as owner or employee, whether for hire or not" any of the enumerated games. It also includes every person who is present or who

plays or bets at or against any such prohibited game or games. Clearly, the act is aimed at those persons who conduct the games and also the players and the spectators. The latter portion of this section has been held constitutional. *Territory v. Wong, et als.,* 40 Haw. 257 (1953). It appears that the act is also intended to prohibit and repress professional gambling, for who but a professional gambler would open or cause to be opened, or conduct a gambling game as owner or employee whether for hire or not? Who but a professional gambler would "cause to be opened" anything but a professional gambling house? Evidently, the framers intended that the commercial gaming houses shall have no place in Hawaii.

The statute also enumerated the type of games which are prohibited, to wit, "faro, monte, roulette, tan, fan tan, or any banking or percentage game" and further specifies the implements by which the latter of such games was to be played—"cards, dice or any device for money, checks, credit, or any representative of value." These games were apparently games then in existence and known to the framers of the new gaming act. In addition to the aforementioned enumerated games the statute also provides a general clause which is clearly intended to include other games which might be devised or which were not then known to the framers. This prohibits "or any other game in which money or anything of value is lost or won." This particular phrase is the only one that has been retained from the previous law relating to gambling, Section 1, *supra.* This latter

clause, a general provision, has been liberally construed by the Hawaii court both under the early law as provided in the *Penal Code* of 1850 and also under the later law, Act 21, *supra.* For instance, the words "any other game" have been held to include a horse race (dicta), *Agnew v. McWayne,* 4 Haw. 422 (1881); a lottery, *The King v. Ah Lee and Ah Fu,* 5 Haw. 545 (1886); Pak Kap Pio, a Chinese lottery, *The King v. Yeong Ting,* 6 Haw. 576 (1885); "7-11," commonly known as "craps," *Territory v. Apoliona,* 20 Haw. 109 (1910); black jack or high card, *Territory v. Tsutsui,* 39 Haw. 287 (1952); and by implication, paikau, *Territory v. Wong & Hong, et als.,* 40 Haw. 423 (1954).

Since the provision "any other game" has been liberally construed by the Hawaii Supreme Court, similarly, in view of the holdings in other jurisdictions and the clear intent of the Hawaii Legislature, the term "anything of value" should also be liberally construed to include free games won on a pin ball machine.

Such construction is warranted in view of the clear legislative purpose of the statute, as expressed by its terms, to outlaw gaming in all its forms. The fact that pin ball machines were not in existence at the time Section 11343, *supra,* was enacted is no valid reason not to construe such a term as including free games won on such machines.

As stated in 24 *Am. Jur., Gaming & Prize Contests,* Section 35, p. 422:

". . . The fact that slot machines had not been invented at the time of the passage of a statute against gaming devises does not afford any reason why they should not be comprehended within the meaning of such statutes." Anno: 20 Ann. Cas. 131.

And in *Giomi v. Chase, supra,* p. 718, it was held:

"A study of our statute satisfies us, conformably to the weight of authority and reason, that when the legislature denounced and rendered unlawful 'any * * * games of chance, played with * * * slot machines or any other gaming device * * * for money or *anything of value',* (emphasis ours), it purposely refrained from attempting any enumeration of the multitude of items constituting 'value', tangible and intangible, comprehended within the phrase 'anything of value'. No doubt the legislature, mindful of the ingenuity ever employed to escape the interdiction of anti-gambling laws, reasoned that if it adopted an all embracing, all consuming phrase, such as this, its true meaning and intent could not be defeated by subtle and refined construction. It no doubt was familiar with the rule that where the language is clear and unambiguous, there is no room for construction. Atlantic Oil Producing Co. v. Crile, 34 N.M. 650, 287 P. 696. And so it employed language free from ambiguity. We have no right to fritter away its meaning by artful construction."

It has been held by the Hawaii Supreme Court that the reasonable and direct purport of the enactment of Section 11343, *supra,* was *"to prohibit as well as discourage all types of gaming." Territory v.*

Wong, et als., supra, p. 263. Such an interpretation is in harmony with the general rules relating to statutes prohibiting gaming.

> ". . . The purpose of the Legislature was to discourage and repress gambling in all its forms and the law is to be construed so as to accomplish, so far as possible, the suppression of the mischief against which it is directed. The evil which the law chiefly condemns is betting and gambling organized and carried on as a systematic business. The reason is obvious. Curb the professional with his constant offer of temptation, coupled with ready opportunity, and you have to a large extent controlled the evil . . ." *People v. Gravenhorst, supra,* p. 771.

It is common knowledge that pin ball machines are not operated solely for amusement but constitute a nefarious subterfuge for wide spread gambling in the form of pay-offs to players who have won free games by proprietors of establishments where the machines are displayed. The "take" of the pin ball machines is usually split percentage wise between the proprietor of the establishment and the owner of the machine. Though ostensibly the machines are for amusement only, the existence of the pay-off scheme has been recognized by the courts.

For example, in *People v. Gravenhorst, supra,* p. 776, a prosecution for possession of a slot machine, the court dwelt on this aspect of the pin ball machines:

> "The court holds no brief for the contention of defense that the machine is operated solely for amusement. The fact that the records of the Po-

lice Department disclose that 4,524 arrests were made in 1939 and 1940, resulting in convictions in 83% of the cases, does not substantiate this argument. The report of the city department referred to above, that one out of every three persons who own or lease pinball machines in this city, has been arrested at least once, and that 40% to 50% of the income derived from these machines are paid out in prizes, fails to support this claim. He would be a credulous person indeed, who could believe that the customers playing for nothing but points, expected only amusement, and were not actuated by the belief that they could use them to obtain money or other things of value. *Chambers v. Bachtel,* 5 Cir., 1932, 55 F. 2d 851, 853; *Harvie v. Heise, supra.* In Steed v. State, 1934, 189 Ark. 389, 72 S.W. 2d 542, 543, the court declared that '[slot or marble machines] are gambling devises per se because the only reasonable and profitable use to which they may be put is use in a game of chance.' "

And in *People v. One Pinball Machine, supra,* p. 955, it was stated:

"Winter and summer resorts, hotels, restaurants, passenger vessels, taverns, bars, dance halls, filling stations, and numerous other places, all over the country, are infested with pinball machines of varied types and character. While they vary in mechanical details, size and shape, and in the name of the game played from the original slot machines, the ultimate result however of the playing is the same, in principle as the playing of the original slot machines. While it does not appear from the evidence in this case still it is

> common knowledge that the so-called free game is frequently but a subterfuge, and that the common practice is for the proprietor, when the player obtains a winning score, to pay off in money or merchandise. It is also common knowledge that the machine itself is sometimes used by players to determine who shall buy the drinks or pay for refreshments, cigars or lunch and when so used it is a gambling device within the meaning of our statute . . ."

See also: *People v. One Mechanical Device, supra; State v. Doe, supra; State v. Ricciardi,* 18 N.J. 441, 114 A. 2d 257 (1955).

The existence of the practice and scheme of making pay-offs to winners of free games on pin ball machines constitutes a lure to the gambling instinct. Customers in stores, restaurants, bars, drive-ins, and the like are thereby encouraged to play these machines. This results in large incomes to the owners of the machines and to the proprietors of the establishments in which they are displayed, thereby breeding businesses of questionable nature interested in the use and operation of these machines.

Another facet of the mischief intended to be repressed by the gambling laws is the fact that pin ball machines directly contribute to conditions which cause juvenile delinquency. Such machines encourage juveniles to become idle, to loiter around establishments where the machines are displayed, and where pay-offs are made, to encourage such juveniles to gamble and commit more serious offenses. See *People v. Gravenhorst, supra,* p. 777.

The existence of pin ball machines, particularly where the pay-off feature is present, encourages the gambling instinct which tends to demoralize the community, family and individual—another obvious evil which the law intends to suppress.

> "It is not questioned that gambling, in the various modes in which it is practiced, is demoralizing in its tendencies and therefore an evil which the law may rightfully suppress without interfering with any of those inherent rights of citizenship which it is the object of government to protect and secure. Gambling is injurious to the morals and welfare of the people and it is not only within the scope of the state's police power to suppress gambling in all its forms, but its duty to do so. The present tendency of courts and Legislatures is to extend the law of nuisances to every sort of gaming. Am. Jurisprudence, Vol. 24, 'Gaming & Prize Contests', Sections 3 and 11. Gambling is a pernicious practice, the offspring of idleness, and the prolific parent of vice and immorality, detrimental to the best interests of society, and encouraging wastefulness, thriftlessness and a belief that a livelihood may be earned by means other than honest industry. The use of these machines is a racket and constitutes a fraud on the innocent public who are unaware of the insidious evil of the display. They contribute directly to delinquency among children and instill and develop a desire to gamble among those who frequent them." *People v. Gravenhorst, supra,* p. 777.

In summary, the term "anything of value" as used in Section 11343, *supra,* is all-embracing in its purport

and meaning as laid down by dictionary, textbook, and case law definitions. This conclusion is supported by judicial decisions in other jurisdictions defining similar statutory terms when applied to pin ball machines awarding free games, and is in accord with the history and analysis of our statutes relating to gaming. It is submitted that without question the majority and better view, based upon reason and principle, is that free games won upon a pin ball machine constitute "anything of value" within the meaning of Section 11343, *supra.* On this issue the decision of the Hawaii Supreme Court should be affirmed.

C. A GAME PLAYED UPON A PIN BALL MACHINE IS WITHIN THE TERM "ANY OTHER GAME" AS PROVIDED IN SECTION 11343, REVISED LAWS OF HAWAII, 1945.

As previously noted herein, the phrase "any other game" in which money or anything of value is lost or won was included in the original gaming act, Section 1, Chapter XL, *Penal Code* of 1850. This phrase was incorporated into the later act, Act 21, *Laws of the Provisional Government,* 1893-4, in substantially the same form. The term "game" has been defined as follows:

> ". . . In general, however, on the ground that in general principle there is no distinction between the various methods that may be adopted for determining by chance who is the winner and who the loser of a bet, whether it is by throwing dice, flipping a coin, turning a card, or running a

> race, the word 'game' has been given a very comprehensive and nontechnical meaning. It is held to extend to physical contests, whether of man or beast, where practiced for the purpose of deciding wagers or for the purpose of diversion, as well as to games of hazard or skill, by means of instruments or devices, and it may be said to embrace every contrivance or institution, whether public or private, of which the object is to furnish sport, recreation, or amusement, on which money or any other article of value can be won or lost by the result of such contrivance or institution . . ." 24 *Am. Jur., Gaming & Prize Contests,* Section 13, p. 407.

Similarly, in *The King v. Yeong Ting, supra,* pp. 577-578, the Hawaii court held under the old gambling statute:

> ". . . Our statute is silent as to whether the game, to be within the law, shall be one of skill, of chance, or of both skill and chance. Therefore it includes games of all these descriptions . . ."
>
> "Our statute is, as I have said, peculiar, and allows great latitude in construction."

The term "any other game" under the old law and under Section 11343, *supra,* also includes, as previously noted, a horse race (dicta), *Agnew v. McWayne, supra;* a lottery, *The King v. Ah Lee and Ah Fu, supra;* Pak Kap Pio, a chinese lottery, *The King v. Yeong Ting, supra;* "7-11," commonly known as "craps," *Territory v. Apoliona, supra;* black jack, high card and a rigged or crooked card game, *Terri-*

tory v. Tsutsui, supra; Territory v. Bollianday, et al., 39 Haw. 590 (1952); and paikau, *Territory v. Wong & Hong, et als, supra.* It need not be a banking or percentage game to be within the terms of the statute. *Territory v. Apoliona, supra.* In view of the liberal construction given by the Hawaii court to the term "any other game" in both the earlier and later gambling statutes, it is submitted that those terms include a game played and won upon a pin ball machine. *Foley v. Whelan,* 219 Minn. 209, 17 N.W. 2d 367 (1945). Such a construction is clearly within the purpose and scope of the gaming statute, and is in accord with the ordinary and usual meaning given to the word "game." The rule of *ejusdem generis* has no application under the circumstances. *People v. Gravenhorst, supra; Foley v. Whelan, supra; Pepple v. Headrick,* 64 Idaho 132, 128 P. 2d 757 (1942); *City of Seattle v. MacDonald,* 47 Wash. 298, 91 Pac. 952, 17 LRA (NS) 49 (1907); 38 *C.J.S., Gaming,* Section 2b; 24 *Am. Jur., Gaming & Prize Contests,* Section 4; see also *Republic Haw. v. Ben,* 10 Haw. 278 (1896) holding *ejusdem generis* rule not applicable to criminal statute relating to profanity in a public place. See also: *State v. Villines,* 107 Mo. App. 593, 81 S.W. 212 (1904); *Van Pelt v. State,* 193 Tenn. 463, 246 S.W. 2d 87 (1952); and *Grafe v. Delgado,* 30 N.M. 150, 228 Pac. 601 (1924), holding rule not applicable to other terms of gaming statutes.

It is respectfully submitted that the language, "any other game" is broad enough to include such a game as one played on a pin ball machine.

D. THE SUPREME COURT OF HAWAII WAS NOT IN ERROR IN HOLDING THAT SECTION 11343, REVISED LAWS OF HAWAII, 1945, WAS NOT VAGUE, INDEFINITE AND UNCERTAIN SO AS TO VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS.

In his Specification of Error No. 2, appellant contends that the phrase "anything of value" in Section 11343, *Revised Laws of Hawaii,* 1945, is too vague, indefinite and uncertain to withstand the strict construction due a penal statute.

Appellee submits that a statute may be so vague as to violate the due process clause of the Fifth as well as the Fourteenth Amendments. In *Connally v. General Construction Co.,* 269 U.S. 385, 70 L. Ed. 322, cited by appellant, the United States Supreme Court affirmed an interlocutory decree of the district court enjoining the enforcement of a statute containing the phrase "current rate of per diem wages in the locality where the work is performed." In so doing, the Court made the oft-quoted statement that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

However, actually the court has required less definiteness than is indicated in the foregoing statement in the *Connally* case. This is borne out by the following statement contained in that very same case on page 328:

> "The question whether given legislative enactments have been thus wanting in certainty has

frequently been before this court. In some of the cases the statutes involved were upheld; in others, declared invalid. The precise point of differentiation in some instances is not easy of statement. But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502, . . . Omaechevarria v. Idaho, 246 U.S. 343, 348, . . . or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, Nash v. United States, 229 U.S. 373, 376, . . . International Harvester Co. v. Kentucky . . . or, as broadly stated by Mr. Chief Justice White in United States v. L. Cohen Grocery Co., 255 U.S. 81, 92, . . . 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.' "

In the case of *United States v. Petrillo,* 332 U.S. 1, 91 L. Ed. 1877, 1883, the court upheld the validity of a statute which punished any person attempting to coerce a licensee to employ "any person or persons in excess of the number of employees needed by such licensee to perform actual services." The court there reasoned that the language used by Congress did provide an adequate warning as to what conduct fell under its prohibition. The court stated:

". . . That there may be marginal cases in which it is difficult to determine the side of the

> line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. Robinson v. United States, 324 U.S. 282, 285, 286. . . . It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees. See Screws v. United States, 325 U.S. 91 . . .;United States v. Ragen, 314 U.S. 513, 522, 524, 525 . . ."

The court in the *Petrillo* case further noted that the Constitution did not require impossible standards.

The language that was struck down in the *Connally* case presented a double uncertainty fatal in a criminal statute. The words "current rate of per diem wages" did not denote a specific sum, but minimum, maximum and intermediate amounts, indeterminately, varying from time to time and dependent upon such considerations as the kinds of work done and the efficiency of workmen hired. The word "locality" was an elastic term which might equally be applicable to areas measured by rods or by miles, depending upon circumstances. The language did not provide a rule of sufficient objectivity to guard against an arbitrary result.

In considering the above cases with the case at bar the court below held that the phrase "anything of value" did give adequate warning as to what falls under its ban, and that it did provide a sufficient standard for the objective and impartial application of the law. See *Territory v. Naumu,* 43 Haw. 66, 70.

Appellant argues that the statute in question enumerates certain games, yet is silent as to games played on a pin ball machine. Appellant further contends that an accused, under Section 11343, *supra,* would have to tax his imagination in order to conclude that a pin ball machine is a "device"; that a game played on such machine is a banking game; that a free game won on a pin ball machine constituted something of value.

Appellee submits that in order to make a statute sufficiently certain in its constitutional requirements does not demand the specifying of designated acts or conduct intended by the legislators to be prohibited. *Lorenson v. Superior Court,* 35 Cal. 2d 49, 216 P. 2d 859.

This principle has been stated more completely in the following language:

> "A gambling game, within the general language of an ordinance prohibiting the playing of any such game, is not taken out of the operation of the ordinance by the fact that the general language is preceded by an enumeration of prohibited games which does not include the particular one in question." 24 *Am. Jur., Gaming & Prize Contests,* Sec. 4, p. 400.
>
> "*Ejusdem generis.* Where general words of Prohibition follow an enumeration of particular games or devices which are prohibited, such general words must be construed ejusdem generis with the games or devices which are specifically named. *However, the ejusdem generis rule will not be applied where the legislature evidently intended that it should not be; and, when the mean-*

> *ing or intention of the legislature is clear, the doctrine cannot properly be applied for the purpose of narrowing or limiting the meaning of a word or phrase used in a gaming statute so as to defeat the legislative intent.* Obviously, the rule will not be applied so as to restrict the general language to 'banking' or 'percentage' games, where not all of the games specifically named in the statute are of that kind and class." (Emphasis added.) 38 *C.J.S., Gaming,* Sec. 2b, p. 76.

Likewise, on page 187 of *Territory v. Uyehara,* 42 Haw. 184, the Supreme Court of Hawaii in construing Section 11343, *supra,* upheld the general rule by stating the following:

> ". . . The language of the gambling statute includes within its prohibition every game in which money or anything of value is lost or won. The game need not be *ejusdem generis* with the games enumerated in the statute . . ."

See also, *Territory v. Apoliona, supra.*

As argued by appellant the Hawaii legislature did not specify or enumerate that which was to be considered "anything of value." However, such an omission is not fatal where gambling is the subject matter of the legislation. "Anything of value" is a standard in and of itself; its frequent use as a standard in penal statutes is an assurance that it is understood by men of ordinary intelligence.

Appellee further submits that the construction and interpretation of Section 11343, *supra,* is sufficient to satisfy the requirements of due process of law where

one is given adequate warning of the offense with which he may be charged. See *Lanzetta v. New Jersey,* 306 U.S. 451, 456, 59 S. Ct. 618, 83 L. Ed. 888; *Winters v. New York,* 333 U.S. 507, 510, 68 S. Ct. 665, 92 L. Ed. 840.

The statute involved here is not a novel one in the realm of general law. As stated above it has existed in the present form since its re-enactment in 1893 as Act 21, *supra.* Further, since its enactment in 1893 Section 11343 has survived without amendment any number of attacks regarding its constitutionality. See *Territory v. Wong, et als, supra.* In that case defendant on page 258, argued that the statute was null and void and therefore, unconstitutional in that it was ". . . so vague and uncertain in its standard of conduct that it violates the due process provision of the Fifth Amendment." The Hawaii court, in upholding the constitutionality of the statute, stated the following on pp. 262-263:

> ". . . Each of the foregoing may be answered by applying the statute in the reasonable and direct purport of its enactment *to prohibit as well as discourage all types of gaming . . .*"

Also in the *Wong* case the Hawaii court further abided by the rule that a reasonable and adequate disclosure of the legislative intent regarding the evil to be denounced in language giving notice of the practices to be avoided conforms to the requirements of the Constitution of the United States:

> "Factual situations, it is urged, have developed in past prosecutions under section 11343 which

> border upon the dividing line of lawful and unlawful presence. 'Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so * * * and if he does so it is familiar to the criminal law to make him take the risk.' *(United States v. Wurzbach,* 280 U.S. 396, 399, 74 L. Ed. 508, 50 S. Ct. 167.)
>
> "That the prohibition of gaming is within the police power of the Territory is too well settled to necessitate the citation of precedent. Since the purpose of enactment of section 11343 is within that power, this court will not question the legislative methods adopted to eliminate the evils of gaming.
>
> "We find that section 11343 conveys sufficiently definite warning of proscribed conduct when measured by the common understanding and practices employed in gaming . . ." (pp. 263-264.)

In view of the intent of the Hawaii legislature to forbid all forms of gambling, coupled with the Hawaii court's endeavor to give meaning and force to its gambling statutes, no basis can be given for supporting appellant's contention that Section 11343, *supra,* is so vague, indefinite and uncertain as to deprive him of his Constitutional rights of due process.

It is submitted that the complexities of the social problems dealt with by the Hawaii legislature require that a practical construction be given to the language used lest the legislative objectives and aims be easily avoided or nullified. See *City of Moberly v. Deskin,* 169 Mo. App. 672, 155 S.W. 842, 844:

". . . In no field of reprehensible endeavor has the ingenuity of men been more exerted than in the invention of devices to comply with the letter, but to do violence to the spirit and thwart the beneficent objects and purposes, of the laws designed to suppress the vice of gambling. Be it said to the credit of the expounders of the law that such fruits of inventive genius have been allowed by the courts to accomplish no greater result than that of demonstrating the inaccuracy and insufficiency of some of the old definitions of gambling that were made before the advent of the era of greatly expanded, diversified, and cunning mechanical inventions. The chief element of gambling is the chance or uncertainty of the hazard. It is not essential that one of the parties to the wager stands to lose. The chance taken by the player may be in winning at all on the throw, or in the amount to be won or lost, and the transaction should be denounced as gaming whenever the player hazards his money on the chance that he may receive in return money or property of greater value than that he hazards. If he is offered the uncertain chance of getting something for nothing, the offer is a wager, since the operator offers to bet that the player will lose and in accepting the chance the player bets that he will win. . . ."

Further, it is contended that in view of the above reasons, Section 11343, *supra,* should be construed in the light of the rule that the constitutionality of statutes is the strongest presumption known to the courts. *United States v. Brewer,* 139 U.S. 278, 35 L. Ed. 190; *State v. Smith,* 35 Neb. 13, 52 N.W. 700; *State v.*

Lancashire Fire Ins. Co., 66 Ark. 466, 51 S.W. 633; *City of Des Moines v. Manhattan Oil Co.,* 193 Iowa 1096, 184 N.W. 823, 188 N.W. 921; *Commonwealth v. Libbey,* 216 Mass. 356, 103 N.E. 923.

> "It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction which would uphold it. It is the duty of courts to adopt a construction of a statute that will bring it into harmony with the Constitution, if its language will permit.
>
> "The duty of the courts so to construe a statute as to save its constitutionality when it is reasonably susceptible of two constructions includes the duty of adopting a construction that will not subject it to a succession of doubts as to its constitutionality, for it is well settled that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubt upon that score. . . ." 11 *Am. Jur., Constitutional Law,* Sec. 97, pp. 725-730.

In *State v. One 5¢ Fifth Inning Baseball Machine, supra,* the pin ball machine involved offered no prizes or free games but the Supreme Court of Alabama held that it nevertheless came under the State's general gambling statute which prohibited:

> ". . . Any machine, mechanical device, contrivance, appliance or invention, whatever its name or character, which is operated or can be operated as a game of chance." (p. 29.)

As indicated, the statute above in comparison to Section 11343, *supra,* is broad and very plain in its terms. The defendant contended and the Alabama court admitted on p. 28:

> "There is no proof the machine has been used for gambling, nor that players were offered inducements by way of prizes or other awards. Defendant contends the machine is one for amusement only, in the playing of which skill plays a more or less important part, and as a consequence it does not come within the influence of our condemnation statute."

In spite of this argument the Alabama court refused defendant's plea that the act was penal and subject to strict construction. It held the act was within the police power of the state and violated no provision of the Constitution, either State or Federal. On this point the court stated on p. 29:

> "We think it clear enough, from the language of this act, especially definition (d), that the law-making body deemed it necessary to prohibit all such machines and devices which could be operated as a game of chance, regardless as to whether there was a 'pay off' or not, in order to fully suppress the gambling evil. That this was within the police power of the State and violated no provision of the Constitution, either State or Federal is well demonstrated . . ."

Also in *Prickett v. State, supra,* p. 462, defendant was charged under a statute reciting the following:

> ". . . Any person who sets up, operates or conducts or who permits to be set up, operated or

conducted, in or about any place of business, or in or about any place, whether as owner, employee or agent, any slot machine for the purpose of having or allowing same to be played by others for money, property, tangible or intangible, coin, currency, check, chip, token, credit, amusement or any representative of value or a thing of value, shall be deemed guilty of a misdemeanor . . .''

In a petition for rehearing (201 P. 2d 798, 799) the Oklahoma court not only denied it but stated:

''To have held otherwise would have nullified the legislative act which prohibited the setting up of these machines 'to be played by others for money, property, tangible or intangible, coin, currency, check, chip, token, credit, amusement, or any representative of value or a thing of value.' . . .

''It is apparent that the Legislature intended to absolutely prohibit the operation of these machines. No plainer language could have been employed to express the legislative intent to prohibit the operation of these machines irrespective as to whether they were played for free games, prizes, or merely for the amusement of the player.

''It was properly a function of the Legislature to determine in the exercise of the police power whether the operation of such machines tended to be injurious to the health, safety, morals, or general welfare of the public. It is not within the power of the court to strike down a legislative enactment unless it is clear that there is no reasonable basis upon which the act might be sustained. There is a strong presumption in favor of the constitutionality of every legislative act,

> and in so far as slot machines are concerned, it is a matter of common knowledge that they are generally adapted to fast, easy gambling; that the label 'for amusement only' placed on many machines is a subterfuge to deceive enforcement officials and hamper them in prosecutions for gambling. The Legislature with a full knowledge of these conditions have prohibited the operation of such machines for amusement or for any other purpose."

In *State v. Le Blond,* 108 Ohio St. 41, 140 N.E. 491, the court announced the principle that legislation otherwise valid would not be judicially declared null and void on the ground that the same was unintelligible and meaningless, unless it was so imperfect and so deficient in its details as to render it impossible of execution and enforcement.

In *Adams v. Greene,* 182 Ky. 504, 206 S.W. 759, the court held that a statute could not be held void for uncertainty if any practical or sensible construction could be given it. Mere difficulty in ascertaining its meaning, the court said, or the fact that it was susceptible to interpretation would not render it nugatory. The court further added that if, after exhausting every rule of construction, no sensible meaning could be given the statute, or if it were so incomplete that it could not be carried into effect, it would then have to be pronounced inoperative and void.

State v. Livingston Concrete Bldg. & Mfg. Co., 34 Mont. 570, 87 Pac. 980, held that although the intention of the legislature might have been expressed in

plainer terms, a court would not hold a solemn legislative enactment of no force or effect because of indefinite language, unless the court found itself unable to define the purpose or intent of the legislature. The court added that inasmuch as the intent of the legislature was the essence of the law it became the function of the court to determine and make known, if possible, such purpose or intent.

In *State v. West Side St. Ry. Co.,* 146 Mo. 155, 47 S.W. 959, the court ruled that a statute could not be held void for uncertainty if any reasonable and practical construction could be given it. It further ruled that it was the duty of the courts to endeavor by every rule of construction to ascertain the meaning of, and to give full force and effect to every enactment of the legislature not obnoxious to constitutional prohibitions.

It was further held in *Hunt v. State,* 195 Ind. 585, 146 N.E. 329, that a court would not nullify an enactment of the legislature because the language used was indefinite in some particular, if the purpose or intent of the legislature could be ascertained.

See also: *State v. Dvoracek,* 140 Iowa 266, 118 N.W. 399; *Cochran v. Loring,* 17 Ohio 409; *Town of Murphy v. C. A. Webb & Co.,* 156 N.C. 402, 72 S.E. 460; *Western Lumber & Pole Co. v. City of Golden,* 23 Colo. App. 461, 130 Pac. 1027.

It is submitted that this Court should approve and should be in accord with the authorities and decisions cited above. In *Territory v. Uyehara, supra,* p. 188,

the Hawaii court quoted *Giomi v. Chase, supra,* in stating the following:

> "'A study of our statutes satisfies us, conformably to the weight of authority and reason, that when the legislature denounced and rendered unlawful "any * * * games of chance, played with * * * slot machines or any other gaming device * * * for money or *anything of value*" (emphasis ours), it purposely refrained from attempting any enumeration of the multitude of items constituting "value", tangible and intangible, comprehended within the phrase "anything of value". No doubt the legislature, mindful of the ingenuity ever employed to escape the interdiction of anti-gambling laws, reasoned that if it adopted an all embracing, all consuming phrase, such as this, its true meaning and intent could not be defeated by subtle and refined construction * * * And so it employed language free from ambiguity. We have no right to fritter away its meaning by artful construction.'"

The other cases cited by appellant—*American Communications Asso. v. Douds,* 339 U.S. 382, 94 L. Ed. 925, 70 S. Ct. 674; *United States v. Cardiff,* 344 U.S. 174, 97 L. Ed. 200, 73 S. Ct. 189; and *Lanzetta v. New Jersey, supra*—add very little to the disposition and solution of the case at bar. Each is clearly distinguishable from the issues presented before this Court.

It is respectfully submitted that appellant, from the general tenor of his brief, concedes that his Specification of Error No. 2 is without serious merit. It would appear, from the emphasis given, that the constitutionality of Section 11343, *supra,* is "challenged" only

as a means of giving this Court jurisdiction in order that appellant may renew his argument that free games won on a pin ball machine do not constitute value. For the reasons contained in this section of this Answering Brief, appellee respectfully urges the dismissal of appellant's Specification of Error No. 2.

CONCLUSION

For the reasons herein contained appellee respectfully submits that the judgment and sentence of the courts below be affirmed.

Dated, Honolulu, Hawaii,
August 18, 1959.

Respectfully submitted,

JOHN H. PETERS
Prosecuting Attorney
FREDERICK J. TITCOMB
Deputy Prosecuting Attorney
City and County of Honolulu
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

Penal Code of the Hawaiian Islands
1850
Chapter XL—Gaming

1. Whoever by playing at cards, or any other game, wins or loses any sum of money or thing of value is guilty of gaming.

2. Gaming is of two degrees, viz: gaming on the Lord's day; and where any person shall at any one time or sitting win or lose twenty-five dollars or more is of the first degree, and other gaming is of the second degree.

3. Whoever is guilty of gaming of the first degree shall be punished by fine not exceeding ten times the value of the money or other thing won or lost, or by imprisonment at hard labor not exceeding sixty days.

4. Whoever is guilty of gaming of the second degree shall be punished by fine not exceeding fifty dollars or imprisonment at hard labor not more than thirty days.

5. Whoever shall by playing at cards or any other game, or by betting on the sides or hands of such as do play, lose any sum of money, or (sic) thing of value, and shall pay or deliver the same or any part thereof, may sue for and recover the money or value of the thing so lost and paid or delivered, from the winner thereof.

6. In case the person, so losing such money or any thing of value shall not within three months after

such loss, in good faith and without collusion, prosecute with effect and without unreasonable delay for such money or other thing of value, it shall be lawful for any constable or other officer or person to sue for and recover treble the value of such money or other thing, with full costs of suit, the one half of which shall go to the person so prosecuting, and the other half to the government, for the use of common schools.

7. All notes, bills, bonds, mortgages or other securities or conveyances whatever, in which the whole or any part of the consideration shall be for any money or other thing of value won by playing at cards, or any other game, or by betting on the sides or hands of any person gaming, or for reimbursing or repaying any money, knowingly lent or advanced for any gaming or betting, or lent and advanced at the time and place of such gaming and betting, to any person so gaming and betting, shall be void and of no effect, as between the parties to the same, and as to all persons, except such as shall hold or claim under them, in good faith and without notice of the illegality of the consideration of such contract or conveyance, and whenever any mortgage or other conveyance of lands shall be adjudged void, under the provisions of this section, such lands shall enure to the sole use of and benefit of such person, as would be then entitled thereto, if the mortgagor or grantor were naturally dead; and all grants or conveyances, for preventing such lands from coming to or devolving upon the person, to whose use and benefit the said lands would so enure, shall be deemed fraudulent and of no effect.

8. In every suit brought to recover any money or other thing of value, as provided in section fifth of this chapter, both the plaintiff and the defendant shall be competent witnesses; and no person other than the parties, shall be excused from testifying, touching any offense committed against any of the foregoing provisions relating to gaming, by reason of his having played, betted or staked, at any game; but the testimony of any such person shall not be used against him in any suit or prosecution authorized by any of the foregoing provisions.

Chapter V—Session Laws of 1870

"An Act to Amend the Law Relating to Gaming.

Section 1. Whoever is guilty of gaming shall be punished by fine, not exceeding one hundred dollars, and by imprisonment at hard labor, not exceeding sixty days.

Section 2. The second, third, and fourth Sections of Chapter XXXIX in the Penal Code, relating to gaming, are hereby repealed.

Approved this 8th day of July, A. D. 1870.

KAMEHAMEHA R."

Chapter XXII—Sessions Laws of 1884

"An act to Amend Chapter XXXIX of the Penal Code Relating to Gaming, by adding thereto a new Section.

Section 1. Chapter XXXIX of the Penal Code is hereby amended by adding thereto Section 9, to read as follows:

Section 9. Every person present in any place or room where any game is carried on, in which any sum of money, or anything of value is lost or won—as a visitor—and every person aiding or abetting gaming, either by furnishing money or anything of value to those engaged in gaming, knowing that such money or thing of value is to be used for gaming, shall be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding two months, or by both such fine and imprisonment.

Section 2. This Act shall be in force from and after its passage.

Approved this 11th day of August, A. D. 1884.

KALAKAUA, REX."

Chapter XLI—Session Laws of 1886

Supplementary to Chapter XXXIX of the Penal Code Relating to Gaming.

"Section 1. No person under any pretense, form, denomination or description whatsoever, or by means of any device or contrivance whatsoever shall sell or dispose of or agree or promise, whether with or without consideration, to sell or dispose of any real or personal property whatsoever to or among any person or persons whomsoever by means of any game of chance or of any other contrivance or device whatsoever whereby any such real or personal property shall be sold or disposed of or divided or allotted to or among any person or persons by lottery or chance whether by the throwing or casting of any dice or

drawing of any tickets, cards, lots, numbers or figures or by means of any wheel or otherwise howsoever.

Section 2. Every person who shall, contrary to the provisions hereof, sell or dispose of, or agree or promise, whether with or without consideration, to sell or dispose of any lands or tenements or any estate or interest therein, or of any ship or vessel, goods, wares or merchandise whatsoever, shall for every such offense forfeit and pay a sum not exceeding five hundred dollars.

Section 3. Any person who shall establish, commence or be a partner in any lottery or in any scheme by which prizes, whether of money or of any other matter or thing are gained, drawn for, thrown or competed for by lot, dice or any other mode of chance, or who shall sell or dispose of, or purchase or have in possession, any ticket or other means by which permission or authority is gained or given to any person to throw for, compete or have any interest in any such lottery or scheme, and any person who shall manage or conduct or assist in managing or conducting any such lottery or scheme shall for every such offence forfeit and pay a sum not exceeding five hundred dollars, and for any second offence, besides such penalty shall be liable to imprisonment with or without hard labor for any term not exceeding six months.

Section 4. If any person being the owner of any painting, drawing, sculpture or other work of art, or literature, or mineral specimens or mechanical models shall apply to the Minister of the Interior for permission to dispose of the same by raffle or chance, it

shall be lawful for the Minister of the Interior, if he think fit, to grant a license for that purpose subject to such conditions and restrictions as he may think it right to impose, and if such conditions and restrictions are complied with, the provisions of this Act or any other law for the time being in force relating to gaming and lotteries shall not apply to such owner or to any other persons who may be bona-fide concerned in such transaction. Notwithstanding anything in this Act or any other law for the time being in force relating to gaming and lotteries it shall be lawful for any association formed for the purpose of promoting agriculture, or horticulture or for improving the breed of poultry to dispose of by lot or chance any specimens bona-fide shown at any show held under the control or management of such association.

Section 5. Any person who shall have unlawfully in his possession any tool, device, implement or ticket used or which can be used for the drawing, carrying on or playing at any lottery, game or faro, monte, roulette, lansquenet, rouge et noir or any other banking game played with cards, dice or any device shall be punishable by a fine not exceeding five hundred dollars for the first offence, and for every subsequent offence by a fine not exceeding five hundred dollars and imprisonment with or without hard labor not exceeding three months, and such tool, device, implement or ticket shall be forfeited and destroyed.

Section 6. Police and District Magistrates throughout the Kingdom shall have power and jurisdiction

to hear and determine, subject to appeal, all complaints for the violation of the provisions of this Act.

Effective October 15, 1886.

KALAKAUA REX."

ACT CXI—Session Laws of 1892

An Act Granting a Franchise to Establish and Maintain a Lottery

(Summary—not verbatim)

Section 1. Grants exclusive franchise to 6 named individuals or to a corporation as may thereafter be organized by them to establish and maintain a lottery for a period of 25 years.

Section 2. Majority of said grantees shall be domiciled in Honolulu, and business shall be conducted in City of Honolulu where all drawings of the lottery shall take place.

Section 3. Grantees to pay $500,000 per annum for franchise in quarterly installments in each.

Section 4. Proceeds of franchise to be used for purposes hereinafter set forth.

First: Subsidy to be paid for an ocean cable between Honolulu and North American Continent.

Second: Subsidy to be paid for construction of a railroad around Island of Oahu $50,000 per annum to company to construct and maintain such railroad.

Third: Subsidy for construction and maintenance of railroad from Hilo through Hilo and Hamakua Districts. $50,000 / annum.

Fourth: Subsidy for improving and maintaining improvements of Honolulu Harbor.

Fifth: For roads, bridges, landings and wharves in Hawaiian Kingdom. $175,000 / annum.

Sixth: For encouragement of industries. $50,-000 / annum.

Seventh: For the encouragement of tourist travel. $25,000 / annum.

Other provisions cover the setting up of corporation and operation of lottery. Also prohibits any lottery other than as provided in this act.

Approved 13th of January, 1903.

LILIUOKALANI R.

Act 6—Laws of the Provisional Government

An Act to repeal an Act entitled "An Act granting a Franchise to establish and maintain a lottery," approved on the 13th day of January A. D. 1893.

Be it Enacted by the Executive and Advisory Councils of the Provisional Government of the Hawaiian Islands:

Section 1. An Act entitled "An Act granting a franchise to establish and maintain a lottery," approved on the 13th day of January A. D. 1893, is hereby repealed.

Section 2. This Act shall take effect from the date of its publication.

Approved this 25th day of January A. D. 1893.

SANFORD B. DOLE
President of the Provisional Government
of the Hawaiian Islands

J. A. King
Minister of the Interior

Act 21—Laws of the Provisional Government

An Act to Prohibit Gambling and Gaming.

Be it Enacted by the Executive and Advisory Councils of the Provisional Government of the Hawaiian Islands:

Section 1. Every person who contrives, prepares, sets up, draws, maintains or conducts, or assists in maintaining or conducting any lottery is guilty of a misdemeanor.

Section 2. A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share or any interest in such property upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, che fa, pakapio, gift enterprise or by whatever name the same may be known.

Section 3. Every person who sells or buys, gives or receives, has in possession or in any manner whatever

deals with any ticket, chance, share or interest, or any paper, certificate or instrument purporting or understood to be or to represent any ticket, chance, share or interest in or depending upon the event of any lottery, is guilty of a misdemeanor.

Section 4. All moneys or property offered for sale or distribution in violation of any of the provisions of this Act are forfeited to the Government and may be recovered by information filed or by action brought by the Attorney General or his authorized representative.

Section 5. Every person who deals, plays, or carries on, opens or causes to be opened, or who conducts either as owner or employee, whether for hire or not, any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game played with cards, dice or any devices for money, checks, credit or any representative of value or any other game in which money or anything of value is lost or won, and every person who plays or bets at or against any of said prohibited game or games, and every person present where such game or games are being played or carried on, is guilty of a misdemeanor.

Section 6. Every person who by the game of "three card monte", "shell game" or any other game, device, sleight of hand, pretension to fortune telling, trick or other means whatever by use of cards or other implements or instruments, or while betting on sides or hands of any such play or game, fraudulently obtains from another person money or anything of value is guilty of a misdemeanor.

Section 7. Every person duly summoned as a witness for the prosecution on any proceeding had under this Act, who neglects or refuses to attend as required is guilty of a misdemeanor.

Section 8. No person otherwise competent as a witness is disqualified from testifying as such concerning any offence committed under this Act on the grounds that such testimony might criminate himself, but no prosecution can afterwards be had against him for any such offence concerning which he has testified.

Section 9. Every person who lets or permits to be used any building or vessel, or any portion thereof, knowing that it is to be used for setting up, managing or drawing any lottery, or for the purpose of selling or disposing of lottery tickets, chance, share or interest in or depending upon the event of any lottery, or who knowingly permits any game or games prohibited by this Act to be played, conducted or dealt in any building or vessel owned or rented by such person in whole or in part, is guilty of a misdemeanor.

Section 10. Every person guilty of a misdemeanor as provided in this Act shall be punishable by a fine of not more than one thousand dollars, or imprisonment at hard labor not exceeding one year.

Section 11. District Magistrates shall have jurisdiction to try and determine all cases arising under this Act.

Section 12. No suit or prosecution pending for any offence committed, or for the recovery of any penalty or forfeiture incurred under any law heretofore en-

acted shall in any case be affected by the passage of this Act.

Section 13. The following laws and parts of laws are hereby repealed:

Section 1 of Chapter 39 of the Penal Code;

Chapter 5 of the Session Laws of 1870;

Chapter 22 of the Session Laws of 1884;

Chapter 41 of the Session Laws of 1886;

Chapter 41 of the Session Laws of 1890;

Chapter 75 of the Civil Code, and Section 26 of Chapter 55 of the Penal Code.

Section 14. Section 80 of the Civil Code and Section 28, Chapter 55 of the Penal Code are hereby amended by striking out the following words, to wit: "Nor allow any gaming on such table or alley."

Section 15. This Act shall take effect upon publication.

Approved this 7th day of March, A. D. 1893.

SANFORD B. DOLE
President of the Provisional Government
of the Hawaiian Islands

J. A. KING
Minister of the Interior